

# **EXHIBIT E**

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 BELCHER PHARMACEUTICALS, LLC,

5 : CIVIL ACTION

6 Plaintiff,

7 :

8 v.

9 :

10 HOSPIRA INC.,

11 : NO. 17-775-LPS

12 Defendant.

13 - - -

14 Wilmington, Delaware

15 Thursday, December 20, 2018

16 Telephone Conference

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18 BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

19 - - -

20 APPEARANCES:

21 BAYARD, P.A.

22 BY: STEPHEN B. BRAUERMAN, ESQ.

23 and

24 GrayROBINSON, P.A.

25 BY: STEFAN V. STEIN, ESQ.,

COLE CARLSON, ESQ., and

WILLIAM V. STEIN, ESQ.

(Tampa, Florida)

26 Counsel for Plaintiff

27 Brian P. Gaffigan  
28 Registered Merit Reporter

1 APPEARANCES: (Continued)

2 PHILLIPS, GOLDMAN, McLAUGHLIN & HALL, P.A.  
3 BY: JOHN C. PHILLIPS, JR., ESQ.

4 and

5 WILLKIE FARR & GALLAGHER, LLP  
6 BY: MATTHEW FREIMUTH, ESQ.,  
7 DEVON W. EDWARDS, ESQ., and  
RONALD A. LEE, ESQ.  
(New York, New York)

8 Counsel for Defendants

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PROCEEDINGS

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(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 11:05 a.m.)

THE COURT: Good morning, everybody. This is Judge Stark. Who is there, please?

MR. BRAUERMAN: Good morning, Your Honor. This is Steve Brauerman from Bayard. I'm joined on the line by Stefan Stein, Cole Carlson, and William Stein from Gray Robinson on behalf of the plaintiff.

THE COURT: Okay.

MR. PHILLIPS: Good morning, Your Honor. This

1 is Jack Phillips from Phillips Goldman on behalf of Hospira;  
2 and with me on the line are Matt Freimuth, Devon Edwards,  
3 and Ron Lee of Willkie Farr. And I believe Mr. Freimuth  
4 will address the Court.

5 THE COURT: Okay.

6 MR. FREIMUTH: Good morning, Your Honor.

7 THE COURT: Good morning. And I have my court  
8 reporter here and for the record, it is our case of Belcher  
9 Pharmaceuticals LLC v Hospira Inc., Civil Action No.  
10 17-775-LPS. And we set this time to talk about a dispute  
11 over a provision in the protective order. We got the letter  
12 first from Hospira so let's hear from Hospira first.

13 MR. FREIMUTH: Good morning, Your Honor. This  
14 is Matthew Freimuth from Willkie Farr.

15 The issue before the Court today as we see it,  
16 is the extent to which Dr. Mike Bauer, who is Hospira's  
17 in-house counsel, should have access to the discovery record  
18 or I should say confidential portions of the discovery  
19 record in this case. And for the reasons set forth in our  
20 letter, Your Honor, we submit that Dr. Bauer should have  
21 full access to materials designated pursuant to the  
22 protective order here.

23 The question before of the Court is the  
24 extent to which Mr. Bauer -- or Dr. Bauer I should say is  
25 a competitive decisionmaker. And we submit based on the

1 declaration of Dr. Bauer that we provided to the Court, he  
2 is not a competitive decisionmaker. His role is to manage  
3 Hospira's portfolio of patent litigation. He supervises and  
4 advises outside counsel. He has been, and continues to be,  
5 an integral part of the litigation team handling this matter.

6 As an attorney, Dr. Bauer is subject to the  
7 same ethical responsibilities as I am as outside counsel.  
8 He has served an in-house counsel for Hospira in dozens of  
9 litigations and has had access to confidential discovery  
10 material in those cases. He knows how to handle it, how  
11 to avoid inadvertent disclosure, and he has agreed, as is  
12 set forth in the declaration, that he will use any discovery  
13 material that he has access to only for purposes of this  
14 case and will not disclose it to anyone outside of the  
15 protective order.

16 It is also relevant to consider what Dr.  
17 Bauer does not do. He is not engaged in any competitive  
18 decision-making for Hospira. He is not an officer of the  
19 company. He is not on the board. He has no business  
20 decision making responsibilities. He is not involved with  
21 sales, marketing, pricing or R&D. He is not involved with  
22 the patent prosecution.

23 And on these facts we submit, Your Honor, the  
24 Court should enter a protective order that permits Dr. Bauer  
25 access to any material designated confidential under it.

1                   With that in mind, we think that a two-tier  
2 order is not warranted in this case, as Dr. Bauer should be  
3 permitted full access. That is really the extent of our  
4 position. And I'm happy to address any questions the Court  
5 has.

6                   THE COURT: All right. So, first off, if I  
7 accepted your position, what would the impact be as you  
8 understand it for Belcher? And so, that is, the result  
9 would be you would have Dr. Bauer with full access, and who  
10 would have access on Belcher's side from your understanding?

11                  MR. FREIMUTH: I understand that Belcher does  
12 not have an in-house litigation counsel. So from Belcher's  
13 perspective, their outside counsel would be able to access  
14 discovery information and certainly confidential discovery  
15 information and certainly any outside experts or consultants  
16 that they retained to look at confidential discovery  
17 information. What they would not be able to do is share  
18 sensitive Hospira business information with any employees  
19 of Belcher who have competitive decision-making authority.

20                  THE COURT: Are you open to them designating one  
21 person who is a non-lawyer employee that would have the same  
22 access that you are seeking for Dr. Bauer?

23                  MR. FREIMUTH: The only person that has come up  
24 in discussions with Belcher over who such a person might be  
25 is Darren Rubin. And this was in discussions we had

1 previously. Mr. Rubin, as we understand it, is the  
2 company's Chief Science Officer. He has responsibilities,  
3 some responsibility for R&D at Belcher. He is a C Suite  
4 executive as we understand it. And he is not a person that  
5 we would be comfortable with sharing any sensitive Hospira  
6 R&D documents with.

7 THE COURT: Because?

8 MR. FREIMUTH: Because presumably of the  
9 extent to which an individual like that, with competitive  
10 decision-making authority, could use that material to some  
11 competitive advantage for Belcher.

12 THE COURT: All right. What about the argument  
13 which is based on I think an undisputed fact that Dr. Bauer  
14 actually doesn't even work for Hospira, he works now for  
15 Pfizer?

16 MR. FREIMUTH: The inquiry here, the extent to  
17 which Dr. Bauer is a competitive decisionmaker and whether  
18 he is, as a technical matter, employed by Pfizer or Hospira  
19 Inc. we think is largely irrelevant to that inquiry. It's  
20 certainly the case that Dr. Bauer was a Hospira employee.  
21 Hospira was acquired by Pfizer in 2015, and the Hospira  
22 Legal Department and I believe most, if not all, Hospira  
23 employees were essentially rolled up into Pfizer such that  
24 Hospira now is a division of Pfizer, is listed in all the  
25 ANDA filings as a, quote, "Pfizer company." So we think it

1       is really a distinction that for purposes of the inquiry  
2       before the Court today doesn't matter.

3                   THE COURT: Do you have a response to this  
4       *Mixing Equipment* case cited by the plaintiff in which that  
5       court seemed to see it differently and said your argument  
6       wrongly ignores the legal distinction between corporate  
7       entities?

8                   MR. FREIMUTH: I do, Your Honor. The difference  
9       in -- *Mixing Equipment* was a slightly different posture in  
10      which a protective order in that case was already in place.  
11      The parties had agreed to it. And then after the fact,  
12      the court had to determine whether a lawyer for the parent  
13      company fit within the definition of "in-house counsel to a  
14      party" as that term had been agreed to and implemented by  
15      the protective order that was already in place.

16                  Here, it is a slightly different issue. You  
17      know, the question of whether Mr. Bauer or Dr. Bauer is a  
18      competitive decisionmaker is sort of squarely before the  
19      Court prior to the entry of an order, and we think that  
20      the posture is different between the two cases.

21                  THE COURT: Is there anything in the record  
22      about this Mr. Zielinski, to whom evidently Dr. Bauer  
23      reports and whether he, that is, his superior is a  
24      competitive decisionmaker? And would that matter?

25                  MR. FREIMUTH: What is in the record about

1       Mr. Zielinski is reflected in paragraph 2 of Dr. Bauer's  
2       declaration which states that Mr. Zielinski is not a  
3       businessperson and does not have direct responsibility over  
4       competitive decision-making.

5               Mr. Zielinski's role is largely irrelevant to  
6       the question before the Court. Really what we're asking  
7       Your Honor to evaluate is the extent to which Dr. Bauer is a  
8       competitive decisionmaker and for the reasons that I have  
9       said he is not.

10              Dr. Bauer acknowledges that if the protective  
11       order we have asked for is entered, and he gets access to  
12       confidential Belcher information under the protective order,  
13       he can't share that information with Mr. Zielinski in any  
14       event.

15              To the extent that what Mr. Zielinski's role  
16       is relevant at all, it is really to give Your Honor comfort  
17       that the risk of inadvertent disclosure here is minimal  
18       given that Mr. Bauer has one direct reporting line and  
19       even that person doesn't have competitive decision-making  
20       authority.

21              THE COURT: Do you oppose a two-tier system if  
22       Dr. Bauer is permitted to review both tiers of material?

23              MR. FREIMUTH: I do think that in this  
24       particular case, a two-tier order -- obviously, we think it  
25       is a good thing if Dr. Bauer were able to review a first and

1 second tier. I don't think this is a case that warrants a  
2 two-tier order primarily because at least from Hospira's  
3 perspective, the nature of what has been requested and what  
4 we intend to produce is largely communications with the  
5 FDA, R&D documents, documents related to our manufacturing  
6 protocols, testing, things like that, all of which would  
7 be of such a sensitive nature that they would likely, to the  
8 extent confidential material was produced, it would be  
9 material that we would expect would be kept in a top tier.  
10 So in the context of this particular case, we just don't  
11 think it's necessarily warranted.

12 THE COURT: Okay. Thank you very much. We'll  
13 hear from Belcher now.

14 MR. CARLSON: Thank you, Your Honor. This is  
15 Cole Carlson from Gray Robinson on behalf of Belcher  
16 Pharmaceuticals.

17 I want to start off by saying that we're not  
18 saying Mr. Bauer can't access any documents in our proposed  
19 order. The first tier, the confidential tier, Mr. Bauer  
20 would have full access to it. And, furthermore, in terms of  
21 litigation logistics and strategy, Hospira would still have  
22 the ability to consult with their expert on AEO documents  
23 relating to research and development as it relates to their  
24 defenses of noninfringement, invalidity and such.

25 As it relates to Dr. Bauer, I mean the language

1 of their proposed protective order is pretty clear. "A  
2 party" means a party subject to this litigation, and "inside  
3 counsel" means any attorney who is an employee of a party.

4 The only party to this litigation is Hospira  
5 Inc. and Belcher Pharmaceuticals. Dr. Bauer is an employee  
6 of Pfizer. We don't think the procedural posture of *Mixing*  
7 *Equipment* is particularly relevant. The analysis is the  
8 same no matter what. You know, a corporation, they are  
9 still separate legal entities and to mix the two would be a  
10 disregard of that legal distinction. So to allow Dr. Bauer,  
11 under Hospira's proposed order, to be the individual with  
12 access would be tantamount to a violation of the order out  
13 of the gate.

14 And Hospira cites to *U.S. Steel* as the basis  
15 for all this, which is the baseline for these protective  
16 orders where serving as in-house counsel can't serve as a  
17 sole reason to deny party access to information deemed  
18 confidential and the inquiry directed to inadvertent  
19 disclosure.

20 Well, here, Dr. Bauer reports directly to Dr.  
21 Zielinski. We don't know anything really about Dr. Zielinski  
22 beyond Dr. Bauer's knowledge of what Mr. Zielinski does.  
23 We don't have a declaration from Mr. Zielinski; and Mr.  
24 Zielinski, as reported by Dr. Bauer, is only, is also only  
25 employed by Pfizer. He is the Chief IP Counsel of Pfizer

14 For example, communications that Belcher has  
15 with third parties about the patent.

16 Communications with the FDA that don't really  
17 involve formulations or anything like that.

18 Internal communications regarding patentability,  
19 enforceability, prosecution, the conception of the matter,  
20 the first use. And the list goes on.

21 So labeling this as a case that doesn't really  
22 require two tiers isn't entirely accurate because there are  
23 a number of documents that Mr. Bauer could look at that  
24 would, he would be able to assist Hospira on in mounting its  
25 defense.

3 THE COURT: All right. So let's talk about this  
4 situation where Dr. Bauer is an employee of Pfizer and not of  
5 Hospira, the party to the case. I'm trying to understand why  
6 that really has any relevance to the dispute before me. Why  
7 shouldn't I think of him as essentially analogous perhaps  
8 to outside counsel, if you are right, as a legal matter, he  
9 doesn't really work for Hospira, he works for Pfizer, so he  
10 is analogous to outside counsel and the question just really  
11 becomes is he a competitive decisionmaker or not, which is its  
12 own question. Why shouldn't I look at it that way?

19                   But to view him as analogous to outside counsel  
20 would still risk inadvertent disclosure because there is  
21 other pending litigation between the parties unrelated to  
22 the patent infringement matter but which are involving  
23 business decisions between the two parties.

24 The name of that case is actually Belcher  
25 Pharmaceuticals LLC v Hospira Inc. That is down here in the

1 Middle District of Florida. It is case 17cv2353. And the  
2 main gist of that case is unfair competition as it relates  
3 to related products.

4 So the danger here in viewing Dr. Bauer as  
5 analogous to outside counsel is the risk of disclosure of  
6 highly confidential documents, and, as in this case, we  
7 argue highly, highly confidential documents because we're  
8 dealing with scientific formulations and the background  
9 to each of the research involved and all that, to allow  
10 Dr. Bauer access to that would result in potential  
11 disclosure in the other case as well without other further  
12 assurances from Hospira which are included in Belcher's  
13 proposed order. Dr. Bauer would have access to the  
14 confidential information, and part of that is an agreement  
15 stating that he would not use the material in any other  
16 manner.

17 The ADL material, he would be disqualified from  
18 and wouldn't be able to view it purely because of the risk  
19 of inadvertent disclosure in the other case.

20 THE COURT: All right. That is a lot of  
21 different things there. Let's try and unpack it.

22 First, I'm really trying to focus on what is  
23 the additional risk or the logic in addition to risk, if  
24 it's something else, to the fact that he is nominally  
25 employed by Pfizer as opposed to Hospira?

1 MR. CARLSON: Then the nominal difference we  
2 view as important because Hospira and Pfizer are two  
3 separate entities. The fact that Hospira is wholly owned by  
4 Pfizer is irrelevant. The Supreme Court has said that being  
5 a wholly owned subsidiary, they share a common purpose and  
6 the parent can assert full control at any moment as a  
7 subsidiary failed to act in the parents best interest.

15 THE COURT: I'm not understanding. Why, if he  
16 was in-house counsel for Hospira and Hospira's parent is  
17 Pfizer, couldn't Pfizer exercise that same power as well?

25 THE COURT: Right. But either way, Dr. Bauer is

1 bound to the agreement regardless of who his employer is;  
2 right?

3 MR. CARLSON: That's correct. But he still  
4 discusses matters with Mr. Zielinski.

5 THE COURT: I guess maybe that is the way to ask  
6 the question. Is there some greater risk you can articulate  
7 that Dr. Bauer is going to intentionally or inadvertently  
8 breach his obligations under this agreement due to the fact  
9 that he is nominally employed by the parent Pfizer instead  
10 of by the subsidiary party to the litigation, Hospira?

11 MR. CARLSON: I guess the answer to that is no if  
12 he were to agree to be bound by the terms of the agreement,  
13 as provided for in the protective order.

14 THE COURT: Is it somehow that -- and I  
15 appreciate that you have acknowledged you are not seeing  
16 it's a greater risk that he will violate given who his  
17 employer is. Is it maybe the damage could somehow  
18 foreseeably be worse if he violated his obligations in,  
19 and he violated it and he is part of a big international  
20 conglomerate, Pfizer as opposed to a smaller company,  
21 Hospira? Is that part of the issue?

22 MR. CARLSON: That is part of the issue. So  
23 Dr. Bauer and Mr. Zielinski are heavily involved in patent  
24 litigation relating to Hospira and Pfizer's drug  
25 applications as well as regulatory inquiries implicating

1 intellectual property issues.

2 In paragraph 3 of his declaration, Dr. Bauer  
3 states he conducts patent evaluation and analysis and  
4 supervises outside counsel in connection with patent  
5 litigation.

6 Judge Burke recently, as of last year, in the  
7 *Fish v Wombat Security Technologies* case stated that a  
8 significant active role in the direction patent litigation  
9 and licensing weighs in favor that in-house counsel actually  
10 participates in competitive decision-making.

11 So the damage here would be that Dr. Bauer and  
12 Mr. Zielinski, assuming Dr. Bauer discloses something to  
13 Mr. Zielinski, could use that information for one of  
14 Pfizer's drug applications. Now, Pfizer is a competitor of  
15 Belcher and so Pfizer's drug application would have a direct  
16 impact on Belcher and its financial well-being.

17 THE COURT: Are you saying Hospira is not a  
18 competitor of Belcher?

19 MR. CARLSON: Well, Hospira is a competitor as  
20 well. But the fact that Dr. Bauer and Mr. Zielinski have  
21 titles with Pfizer and have responsibilities to Pfizer mean  
22 that any potential issues that crop up would inure to the  
23 benefit of -- potentially inure to the benefit of Pfizer as  
24 opposed to Hospira, and that would damage Belcher.

25 THE COURT: All right. Let's talk about the

1 impact on Belcher.

2 First off, is there someone that you are  
3 considering that, whether I have a one-tier or two-tier  
4 designation, that you think should have access to everything  
5 who is in-house at Belcher?

6 MR. CARLSON: Yes. As Mr. Freimuth stated, that  
7 would be Darren Rubin. He is the Chief Science Officer. We  
8 would have Mr. Rubin sign the agreement stating he would not  
9 use any of the information for any other purpose besides the  
10 litigation, to provide analysis for on behalf of outside  
11 counsel and all that. And so there is no -- assuming that  
12 he signs the agreement, he would be bound by the protective  
13 order, and there would be a reduction in the potential of  
14 inadvertent disclosure.

15 THE COURT: Well, is Mr. Rubin a competitive  
16 decisionmaker in the way the law uses that term?

17 MR. CARLSON: Well, I guess Mr. Rubin is  
18 involved in patent litigation. He is just like Dr. Bauer.  
19 He is involved in managing patent litigation for Belcher.  
20 He is one of the individuals that we deal with at Belcher  
21 regularly with regard to this case. He is also responsible  
22 for responding to regulatory inquiries that implicate IT  
23 issues.

24 So if Dr. Bauer is acceptable, then Mr. Rubin  
25 should be acceptable as well.

1 THE COURT: Except the suggestion at least --  
2 and I don't think I have much, if anything, in the record  
3 about this Mr. Rubin. But the suggestion I'm hearing from  
4 Hospira is that Mr. Rubin also actually does research and  
5 oversees research, and, therefore, it would be impossible  
6 for him to put aside what he learns about the confidential  
7 or highly confidential research activities of a competitor,  
8 Hospira. Is that something that is either factually based  
9 or that I should be concerned with?

10 MR. CARLSON: I will say that Mr. Rubin, I do  
11 believe he is involved in some of those activities. But I  
12 also believe there are other individuals at Belcher that are  
13 not involved with those activities.

14 So if there were -- you know, if we can provide  
15 to Hospira an individual that is acceptable, we would be  
16 open to having this one person, not a lawyer, employee have  
17 the same type of access as Mr. Bauer -- or Dr. Bauer.  
18 Excuse me.

19 THE COURT: So there may be other people at  
20 Belcher that you could identify as candidates?

21 MR. CARLSON: I believe so, yes.

22 THE COURT: All right. Now, you make an  
23 argument, I'm not sure if I have seen it before, at least  
24 I don't recall it, that there may be an ethical issue here  
25 in that depending on how I decide this, I might be putting

1 presumably outside counsel in a position where they're going  
2 to breach their ethical obligations.

3 Again, I don't think I have heard that argument  
4 in connection with the protective order dispute. We have  
5 had plenty of I think one-tier, two-tier or zero-tier  
6 protective orders, and I certainly haven't thought that I'm  
7 putting counsel in a position to violate their ethical  
8 duties, and you haven't raised that argument today, but if  
9 that is something that you think I need to consider, I'd  
10 like to hear more about that.

11 MR. CARLSON: Sure. So as currently set with  
12 Hospira's proposed protective order, outside counsel for  
13 Belcher would simply have itself and its expert to consult  
14 with, with regard to certain types of information.

15 The ethical rule says that we have to inform the  
16 client of decisions and circumstances where they're informed  
17 and consent is required. We have to consult with clients  
18 about how we're going to accomplish certain objectives and  
19 keep them informed about the status of the matter. So if we  
20 are unable to share with the client certain information that  
21 would require us to change the objectives that the client  
22 may want to accomplish, then we would not be able to meet  
23 the rule.

24 An example we provided in the letter was, one of  
25 their defenses and counterclaims is the patent is invalid.

1       Part of their invalidity contentions involve portions of  
2       their NDA, I believe. I think it's part of their NDA. If  
3       not, it's confidential information, information that will be  
4       deemed confidential under Hospira's protective order.

5           And so we would not be able to share that  
6       information with the client. And so we would not be able to  
7       keep them informed about the matter, and we wouldn't be able  
8       to make sure that what they want to get done gets done.

9           THE COURT: All right. Well, again, I don't  
10       think I have heard that argument before. And I have had  
11       plenty of cases where there has been essentially a one-tier  
12       protective order and outside counsel have somehow managed to  
13       comply with their ethical obligations in a case like this.

14           I don't know exactly how they do it, but I can  
15       imagine something like in your circumstance you would give  
16       advice to your client about here is our assessment as to the  
17       likelihood or the magnitude of the risk to the validity of  
18       your patent. Certainly, you can tell them whatever, it is  
19       an obviousness defense or something like that, but you can't  
20       get into all of the substantive detail of the argument, but  
21       you can give them presumably your assessment as to the  
22       likelihood that you are going to prevail or not prevail.

23           Again, I don't know the details of how one  
24       complies with their obligations in this circumstance, but am  
25       I -- are you really asking me to conclude that if I impose a

1       one-tier designation here, all the folks on the plaintiff's  
2       side or outside counsel are going to be in breach of their  
3       ethical obligations?

4                    MR. CARLSON: No, we're not saying that. We're  
5        saying the set up that is in Hospira's protective order  
6        could prevent us from fully discussing with somebody with  
7        more substantive knowledge than an outside consultant to  
8        fully keep the client reasonably informed.

9                    So as it is currently set up, there is outside  
10       counsel, inside counsel, and then all the other people  
11       like the experts and the Court that can see confidential  
12       information.

13                  Since Belcher has no inside counsel, that  
14       provision is essentially meaningless for Belcher. And so  
15       the only people who would be able to view confidential  
16       information and analyze it are outside counsel and their  
17       expert. And so it would be impossible for us to keep the  
18       client reasonable informed about the status of the matter.

19                  We can tell them that we, based on our  
20       assessment, we think the patent is still valid or invalid,  
21       but we'd essentially be keeping them in the dark about the  
22       reasons why, especially with a case like this where there  
23       is highly technical chemical formulas involved in terms of  
24       amounts and percentages of amounts over periods of time.

25                  The client, in order to keep the client informed

1 about what the best way going forward would be, is we  
2 need to be able to inform them of aspects of confidential  
3 information beyond just we think the patent is valid or  
4 invalid.

5 THE COURT: All right. Thank you very much.

6 Let me turn back to Hospira. Mr. Freimuth, do  
7 you want to add anything?

8 MR. FREIMUTH: Sure. Just a couple quick  
9 points, Your Honor.

10 With regard to the questions that you raised  
11 with respect to what we view as really a technical issue of  
12 who is Mr. Bauer's employer, we do think the right inquiry  
13 remains whether or not he is a competitive decisionmaker or  
14 not.

15 We don't think there is any greater risk to  
16 inadvertent disclosure by virtue of the fact that he is  
17 technically a Pfizer employee versus technically a employee  
18 of Hospira Inc.

19 They are, for intents and purposes, Hospira is a  
20 division. Mr. Bauer has acknowledged in his declaration  
21 that he doesn't and will not disclose the information to  
22 anyone within Pfizer or Hospira, including Mr. Zielinski.  
23 So we just simply don't believe that there is a greater  
24 risk. And to the extent that there is a technical issue  
25 with the way the proposed order that we have submitted to

1 the Court defines a party, we think that that is an issue  
2 that could easily be addressed before Your Honor enters the  
3 order.

4 Mr. Carlson made reference to a protective order  
5 in a separate case between Belcher and Hospira in Florida.  
6 We note that in that case, in-house counsel is permitted  
7 access to both highly confidential and confidential documents,  
8 and in-house counsel includes counsel of defendant Hospira  
9 or its parent Pfizer. So we think that that is a situation  
10 that could easily be addressed by the wording of the order  
11 that the Court enters rather than sort of the technicality.

12 Also, with respect to Mr. Rubin, I just want to  
13 point out that -- and I think Your Honor raised this point.  
14 Given what I think is a clear statement that he does have  
15 some competitive decision-making authority, our view is that  
16 a person like that is simply not able to sort of divorce  
17 from their mind the information that they've learned in the  
18 context of getting access to information in discovery from  
19 their competitive decision-making responsibility. So the  
20 risk of inadvertent disclosure or use, it is particularly  
21 high in that circumstance, and we just don't think he is a  
22 suitable person.

23 THE COURT: All right.

24 MR. CARLSON: Your Honor, if I may just real  
25 quick.

1 THE COURT: In a minute. I actually have a few  
2 more questions for Mr. Freimuth.

3 So I think you are probably right in this case  
4 that the nominal party that is employing Dr. Bauer doesn't  
5 really make a difference in terms of the likelihood of a  
6 breach. But what about this argument that if there is a  
7 breach, the resulting damage could be much greater given the  
8 wider footprint of Pfizer as an international conglomerate  
9 than if there was the same breach but Dr. Bauer was employed  
10 by Hospira?

23 So the risk here is low regardless of whether,  
24 as a technical matter, he is an employee of Hospira Inc.,  
25 which I understand as a technical matter actually has no or

1       very few employees of its own, or, as a technical matter,  
2       whether he is an employee of Pfizer.

3                   THE COURT: All right. Are you seeking, by this  
4       protective order, to permit Dr. Bauer to use what he learns  
5       to help in this other litigation the parties have in  
6       Florida?

7                   MR. FREIMUTH: No. And I don't believe -- no.  
8       Dr. Bauer will use the information for this litigation,  
9       meaning the case we're on the phone discussing now.

10                  THE COURT: All right. Is there anything to  
11       say about this ethical argument that I might be setting up  
12       plaintiff's outside counsel to at least have challenges to  
13       fulfill their obligations to their client?

14                  MR. FREIMUTH: I think, as outside counsel, this  
15       is an issue we confront all the time, and we're all capable  
16       of sort of summarizing and discussing issues and information  
17       with our clients without disclosing specific, competitively  
18       sensitive business information that has been produced in the  
19       case, particularly with the benefit of inside from outside  
20       experts.

21                  THE COURT: All right. Thank you very much.

22                  Mr. Carlson, you can go ahead.

23                  MR. CARLSON: Thank you, Your Honor.

24                  The only thing I was going to say is that we  
25       will concede Mr. Rubin is a competitive decisionmaker. But

1       we do still believe that there are others at Belcher  
2       that would be able to assist outside counsel who are not  
3       competitive decision-making.

4                   THE COURT: Okay. Great. Thank you very much.

5                   So thank you for the helpful argument.

6                   As I see it, the first issue is whether there  
7       should be a one-tier or two-tier structure here protecting  
8       confidential and highly confidential material; and then the  
9       second issue is whether Dr. Bauer should be permitted to  
10      see some or all of that material; and then I think there is  
11      a third issue.

12                  But on the first issue, the protective order  
13      I'm going to sign should have a two-tier confidentiality  
14      structure. It may turn out to be that very little falls  
15      into the first tier, that is the merely confidential  
16      information, but I can't say at this point that there will  
17      be nothing in that first tier. And so I think it is helpful  
18      and appropriate to have the two tiers, and, of course, the  
19      parties have to do their best in good faith to designate  
20      things appropriately. If it's only confidential, then it  
21      should go into the first tier, and if it is truly highly  
22      confidential, then it can go into the second tier.

23                  The next issue is, I hereby find that Dr. Bauer  
24      is going to be permitted to have access to both tiers of  
25      information. And by that, what I mean to say is the

1 plaintiffs have not persuaded me that he is an inappropriate  
2 person to have access to both the confidential and the  
3 highly confidential information.

4 To the extent the plaintiff's argument turns on  
5 the I think undisputed fact that Dr. Bauer is technically  
6 employed by Pfizer, which is not a party to this litigation,  
7 as opposed to being technically an employee of Hospira, a  
8 subsidiary now of Pfizer and Hospira itself as the party  
9 here, I am just not seeing much relevance to that fact to  
10 the issue before me.

11 I'm not seeing any basis to conclude that the  
12 party who is employing Dr. Bauer is somehow increasing the  
13 risk that Dr. Bauer, once he signs this, he'll be obligated  
14 to do the obligation to comply with the protections of the  
15 protective order, that somehow the risk of him breaching  
16 those obligations is materially greater because he is  
17 nominally employed by Pfizer as opposed to Hospira. And I  
18 am confident that the parties can revise the language of the  
19 protective order to the extent necessary to make sure that  
20 the definition of party or of any other definitions here  
21 doesn't render Dr. Bauer ineligible out of the box.

22 I can see a theoretical argument that even if  
23 the risk of a breach is the same when Dr. Bauer is employed  
24 by Pfizer as it is were he employed still by Hospira, that  
25 somehow the magnitude of the damage that is likely to occur

1 is materially greater now that he works for a larger parent  
2 conglomerate instead of the subsidiary to this litigation.

3 Theoretically, that concept has some logic to  
4 it. But there is no record here, no evidence and no reason  
5 comes to mind as to why I should think that in this case  
6 that is a real risk or something that should cause me to say  
7 Dr. Bauer is not appropriate to receive highly confidential  
8 information.

9 Notably, Dr. Bauer has been through this before.  
10 He signed on to other protective orders. There is just no  
11 reason to expect that he is going to breach his obligations,  
12 and there is nothing that has been proven that would suggest  
13 that given his obligations in the company, that the human  
14 fact that he won't be able to necessarily put things out of  
15 his mind is somehow creating a risk that is likely to damage  
16 Belcher.

17 That is a long way of saying it hasn't been  
18 proven to me that he is a competitive decisionmaker. So I  
19 just am not seeing the plaintiff meeting their burden to  
20 preclude Dr. Bauer from having the full access that Hospira  
21 seeks.

22 The third sort of issue as I see it is, well,  
23 what does all of this mean to Belcher? I am not persuaded  
24 by the ethical arguments, but I do think that it would be  
25 better for this case if there is someone at Belcher that can

1 see not only the confidential information but also the  
2 highly confidential information.

3 It is not Mr. Rubin, who is concededly a  
4 competitive decisionmaker and more particularly is involved  
5 in, if not running, R&D for Belcher. And there, I think the  
6 risk is too great, a risk based on inadvertence. I'm not  
7 suggesting Mr. Rubin would intentionally violate obligations  
8 he would have to undertake pursuant to the protective order,  
9 but the fact that I don't think that he could put out of  
10 his mind the highly confidential research and development  
11 information he would have access to from Hospira when he is  
12 making decisions and doing and overseeing research that is  
13 competitive with Hospira on behalf of Belcher is too great  
14 of a risk and, therefore, not one that I am going to permit.

15 But I am open to and indeed hopeful that Belcher  
16 will be able to identify somebody in-house who doesn't pose  
17 quite those same risks to whom -- continuing to be helpful  
18 to whom Hospira will agree can see both tiers of information.  
19 And to the extent Hospira does not agree, then you will all  
20 be back in front of me and I'll have to make a decision  
21 based on whatever the record is at that point.

22 So to be as clear as I can, nothing I'm saying  
23 today is meant to preclude the plaintiff from having an  
24 opportunity to try to identify someone who can serve the  
25 role in-house of reviewing confidential and highly

1 confidential information.

2 All that said, I do want to sign a protective  
3 order consistent with what I have said. So I would like to  
4 get a new version from you all without adversely impacting  
5 anybody's holiday plans. So I will ask you if you have any  
6 questions and what your proposed time frame would be for  
7 getting me a new submission. First, Mr. Freimuth.

8 MR. FREIMUTH: I don't have any questions, Your  
9 Honor, with respect to your ruling. I would think with  
10 respect to timing, we could submit something, I think the  
11 substantial completion of document production is January  
12 11th. We could try to submit something to the Court before  
13 then.

14 THE COURT: That would certainly be fine by me  
15 but, Mr. Carlson, any questions and what do you think of  
16 submitting a new version no later than January 11?

17 MR. CARLSON: My only question is, I guess it's  
18 more of a comment, is that Belcher would request that the  
19 individual that puts forward the acceptance by Hospira not  
20 be unreasonably withheld. I'm sure we can throw that  
21 information in the protective order; but otherwise, January  
22 11th I believe will be fine with us.

23 THE COURT: Okay. Certainly, the acceptance  
24 should not be unreasonably withheld. If you all want to put  
25 that language in a protective order, that's fine. If you

1       don't, that is my view of it, and that is the approach I  
2       will take if a dispute comes back to me.

3                   Anything else, Mr. Freimuth?

4                   MR. FREIMUTH: No, Your Honor.

5                   THE COURT: And Mr. Carlson, anything else?

6                   MR. CARLSON: No, Your Honor.

7                   THE COURT: Okay. Thank you all very much.

8                   Happy Holidays. Good-bye.

9                   (Telephone conference ends at 11:54 a.m.)

10  
11                   I hereby certify the foregoing is a true and accurate  
12                   transcript from my stenographic notes in the proceeding.

13                   /s/ Brian P. Gaffigan  
14                   Official Court Reporter  
15                   U.S. District Court

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